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No. 84-1978

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN SPICER, JR., PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Military Appeals correctly concluded that Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, authorizes prosecutions for negligent homicide on the basis of simple negligence.

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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a) is reported at 20 M.J. 188. The opinion of the United States Army Court of Military Review (Pet. App. 2a-4a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on April 23, 1985. The petition for a writ of certiorari was filed on June 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(1).

STATEMENT

Petitioner, a member of the United States Army, was tried by a military judge sitting as a general court-martial at Fort Bliss, Texas. Petitioner was convicted of negligent homicide, in violation of Article 134 of the Uniform Code of

Military Justice (UCMJ), 10 U.S.C. 934.[1] He was sentenced to a bad conduct discharge, 335 days' confinement, forfeiture of all pay and allowances, and reduction to Private E-1. The convening authority, the Commanding General of the United States Army Air Defense Center at Fort Bliss, reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence.

On mandatory appeal before the United States Army Court of Military Review, the court ordered the submission of briefs on the previously unraised issue of the continued vitality under the UCMJ of the offense of negligent homicide (Pet. App. 2a-4a; App., *infra*, 1a-2a). In response to the specified issue, petitioner argued, as he does here, that Congress intended to preclude the prosecution of negligent homicide under Article 134, UCMJ, 10 U.S.C. 934. The court first found that petitioner's conduct "was at least simple negligence" (Pet. App. 3a-4a). The court then rejected petitioner's legal argument, concluding "that the weight of authority is appropriately in favor of continuing negligent homicide as a separate offense under Article 134, Uniform Code of Military Justice" (*id.* at 4a). On discretionary review pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the United States Court of Military Appeals also considered and rejected the same argument, citing its earlier decision in *United States* v. *Kick*, 7 M.J. 82 (1979), and affirmed the decision of the United States Army Court of Military Review (Pet. App. 1a).

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[1]While driving a privately owned vehicle on Fort Bliss, petitioner abruptly swerved over the curb and onto a sidewalk, thereby striking and killing Colonel Frank V. Lindstrom (Pet. App. 3a; Tr. 61). The sun was shining, the road was dry, the view was unobstructed, and petitioner's car was in sound mechanical condition (Pet. App. 3a; Tr. 34, 39).

ARGUMENT

The decision of the United States Court of Military Appeals is correct and does not conflict with any decision of this Court or of any court of appeals. In addition, the Court of Military Appeals' settled interpretation of Article 134 of the UCMJ, 10 U.S.C. 934, involves only a narrow question of statutory construction that has no impact outside of the military justice system. Accordingly, further review is not warranted.

1. The Court of Military Appeals correctly determined that Congress, when it enacted the UCMJ in 1950 (Act of May 5, 1950, ch. 169, 64 Stat. 108 *et seq.*), did not intend to preempt prosecutions for negligent homicide under Article 134 — one of the general articles of the UCMJ.[2] In construing the scope of Article 134, the Court of Military Appeals has developed and regularly applied what it has chosen to label the "preemption" doctrine. See, *e.g.*, *United States* v. *Wright*, 5 M.J. 106 (1978).[3] Petitioner does not challenge

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[2]Article 134 provides as follows:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The constitutionality of Article 134 was upheld by this Court in *Parker* v. *Levy*, 417 U.S. 733 (1974), and is not at issue here. See also *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1858); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974). Nor does petitioner contend that his conviction for negligent homicide on the basis of simple negligence violated substantive rights under the Due Process Clause of the Fifth Amendment.

[3]Although the "preemption" label did not attach until 1960, the concept underlying the doctrine of preemption was first discussed by the Court of Military Appeals in *United States* v. *Norris*, 2 C.M.A. 236,

the validity of this rule of statutory construction, but instead contends that in applying the rule in the area of negligent homicide, the Court of Military Appeals has reached the wrong result. Petitioner's argument is based on a misreading of the legislative history of the UCMJ and fails to account for Congress's approbation of over 40 years of military practice.

As developed by the Court of Military Appeals, the doctrine of preemption holds that prosecution under the general articles is precluded whenever "Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in the specific articles," and "the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134." *United States* v. *Wright*, 5 M.J. at 110-111. The central inquiry under the preemption doctrine is whether Congress "covered the entire field" in its enactment of a specific punitive article. *United States* v. *Norris*, 2 C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953).[4] To

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8 C.M.R. 36 (1953). See also *United States* v. *Hallett*, 4 C.M.A. 378, 15 C.M.R. 378 (1954); *United States* v. *Fuller*, 9 C.M.A. 143, 25 C.M.R. 405 (1958); *United States* v. *Frayer*, 11 C.M.A. 600, 29 C.M.R. 416 (1960); *United States* v. *McCormick*, 12 C.M.A. 26, 30 C.M.R. 26 (1960); *United States* v. *Picotte*, 12 C.M.A. 196, 30 C.M.R. 196 (1961); *United States* v. *Toutges*, 13 C.M.A. 425, 32 C.M.R. 425 (1963); *United States* v. *Herndon*, 15 C.M.A. 510, 36 C.M.R. 8 (1965); *United States* v. *Taylor*, 17 C.M.A. 595, 38 C.M.R. 393 (1968); *United States* v. *Harvey*, 19 C.M.A. 539, 42 C.M.R. 141 (1970); *United States* v. *Martinson*, 21 C.M.A. 109, 44 C.M.R. 163 (1971); *United States* v. *Maze*, 21 C.M.A. 260, 45 C.M.R. 34 (1972); *United States* v. *Bonavita*, 21 C.M.A. 407, 45 C.M.R. 181 (1972). The early cases are collected and discussed in Ackroyd, *The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice*, 35 St. John's L. Rev. 264, 285-293 (1961).

[4]By way of example, the Court of Military Appeals has held that Congress intended "to cover the entire range of offenses which are assimilable to misbehavior before the enemy" when it enacted the specific prohibitions of Article 99, UCMJ, 10 U.S.C. 899, thus

support a finding of preemption, Congress's intent must be manifest, for "unless there are clear indications that Congress, by enacting one statute, intended not to permit prosecution under any other law, then the Government may choose which punitive Article will be used to support the specification and charge." *United States* v. *Frayer*, 11 C.M.A. 600, 607, 29 C.M.R. 416, 423 (1960) (Latimer, J., concurring and dissenting in part).

In *United States* v. *Kick*, 7 M.J. 82 (1979) (Pet. App. 36a-50a), the Court of Military Appeals specifically considered whether Congress, by its enactment of Articles 118 and 119, UCMJ, 10 U.S.C. 918 and 919, intended to "cover the entire field" of homicide so as to preempt prosecutions for negligent homicide under Article 134. After a review of the legislative history of the relevant Code provisions, the court held that Congress did not intend to preempt such prosecutions. *United States* v. *Kick*, 7 M.J. at 84-85.[5]

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precluding prosecution under Article 134 for similar conduct not amounting to an Article 99 violation. *United States* v. *Hallett*, 4 C.M.A. 378, 382, 15 C.M.R. 378, 382 (1954). On the other hand, again by way of example, the Court of Military Appeals has held that Articles 129 and 130, UCMJ, 10 U.S.C. 929 and 930, punishing burglary and housebreaking, did not preempt a Federal Assimilative Crimes Act prosecution under the "crimes and offenses not capital" provision of Article 134 for a soldier's burglary of an automobile in violation of the Texas Penal Code. *United States* v. *Wright*, 5 M.J. at 110-111. In each instance, and in other cases involving application of the preemption doctrine, the result depended upon the legislative history of the particular UCMJ provisions involved.

[5]In an unbroken line of cases, without in so many words addressing the "preemption" issue, the Court of Military Appeals has held that the offense of negligent homicide predicated on simple negligence is punishable under Article 134. See, *e.g.*, *United States* v. *Kirchner*, 1 C.M.A. 477, 4 C.M.R. 69 (1952); *United States* v. *Russell*, 3 C.M.A. 696, 14 C.M.R. 114 (1954); *United States* v. *Greenfeather*, 13 C.M.A. 151, 32 C.M.R. 151 (1962); *United States* v. *Bryan*, 19 C.M.A. 184, 41 C.M.R. 184 (1970); *United States* v. *Romero*, 1 M.J. 227 (C.M.A. 1975). Yet, in the face of this judicial interpretation, Congress has not acted to preclude negligent homicide prosecutions even though its oversight of the Armed Forces' judicial system has been extensive. See note 10, *infra*.

Examination of the relevant legislative history supports the conclusion of the Court of Military Appeals in *Kick*, and supports as well the conclusion that Congress did not intend to require proof of a mental state greater than simple negligence in such prosecutions.

First, the offense of negligent homicide, predicated on simple negligence, was prosecuted as a general neglect or disorder under Article 96 of the Articles of War (41 Stat. 806) by both the Army and the Air Force for at least six years prior to adoption of the UCMJ.[6] Second, at the time Congress deliberated on the proposed UCMJ, the *Manual for Courts-Martial, United States Army—1949* contained a

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[6]See *United States* v. *Groat*, 34 B.R. 67 (1944) (Pet. App. 58a-74a). By 1950, this interpretation of Article of War 96 was entrenched in the Army and the Air Force. See *United States* v. *Gilbert*, 3 C.M.R.(A.F.) 18 (B.R. 1950); *United States* v. *Smith*, 1 B.R.-J.C. 307 (A.B.R. 1949); *United States* v. *Senck*, 78 B.R. 175 (1948); *United States* v. *Endicott*, 76 B.R. 51 (1948); *United States* v. *Porter*, 69 B.R. 257 (1947); *United States* v. *Rhimes*, 69 B.R. 123 (1947); *United States* v. *Tyndall*, 67 B.R. 303 (1947); *United States* v. *Locket*, 1 B.R.(P.O.A.) 247 (1945).

The following decisions reached after enactment of the UCMJ on May 5, 1950, but prior to its effective date one year later, similarly interpreted Article of War 96 as permitting prosecutions for negligent homicide based upon simple negligence. *United States* v. *Jones*, 10 B.R.-J.C. 255 (A.B.R.), confirmed with sentence reduction, 10 B.R.-J.C. 264 (A.J.C. 1951); *United States* v. *Marr*, 4 C.M.R.(A.F.) 511 (B.R.), confirmed and rev'd in part with sentence reduction, 4 C.M.R.(A.F.) 518 (J.C. 1951); *United States* v. *Bell*, 9 B.R.-J.C. 301 (A.B.R. 1950); *United States* v. *Bussard*, 7 B.R.-J.C. 197 (A.B.R. 1950); *United States* v. *Patch*, 7 B.R.-J.C. 89 (A.B.R.), confirmed, 7 B.R.-J.C. 100 (A.J.C. 1950).

Article of War 96 was prescribed by Congress in the Act of June 4, 1920, ch. 227, 41 Stat. 787 *et seq.*, as amended by Act of Aug. 20, 1937, ch. 716, 50 Stat. 724 (amending Articles 50½ and 70); Act of Aug. 1, 1942, ch. 542, 56 Stat. 732 (amending Article 50½); Act of Dec. 14, 1942, ch. 730, 56 Stat. 1050 (amending Article 114); Act of Dec. 15, 1942, ch. 735, 56 Stat. 1051 *et seq.* (amending Article 52); Act of June 24, 1948, ch. 625, 62 Stat. 604 *et seq.*

sample specification in Appendix 4 for the offense of negligent homicide under the 96th Article of War, prescribed a maximum punishment for the offense in Paragraph 117*c*, and listed negligent homicide as a lesser included offense to manslaughter in Paragraph 180*a*. The *Manual for Courts-Martial, United States Air Force—1949* contained the same provisions.[7] Third, hearings before a subcommittee of

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[7]The President has regularly included the offense of negligent homicide in his Manual for Courts-Martial since 1949. See *Manual for Courts-Martial, United States—1984* Pt. IV (Punitive Articles), ¶ 85; *id.* App. 12-7 (Maximum Punishment Chart), Art. 134; *id.* App. 21-101 (Analysis), ¶ 85; *Manual for Courts-Martial, United States—1969* ¶ 127*c* (Table of Maximum Punishments) (rev. ed.); *id.* ¶ 213*f*(12) (Punitive Articles); *id.* App. 6*c* (Forms for Charges and Specifications), ¶ 154; *id.* App. 12-4 (Table of Commonly Included Offenses), Arts. 118, 119; U.S. Dep't of Army, *Pamphlet No. 27-2, Analysis of Contents Manual for Courts-Martial, United States—1969, Revised Edition* ¶ 213*f*(12); *Manual for Courts-Martial, United States—1969* ¶ 127*c* (Table of Maximum Punishments); *id.* ¶ 213*f*(12) (Punitive Articles); *id.* App. 6*c* (Forms for Charges and Specifications), ¶ 154; *id.* App. 12-4 (Table of Commonly Included Offenses), Arts. 118, 119; *Addendum to the Manual for Courts-Martial, United States—1951* ¶ 127*c* (1963); *id.* ¶¶ 197*g*, 198*a* and *b*; App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States Army—1951* ¶ 127*c* (Supp. 1959); *id.* ¶¶ 197*g*, 198*a* and *b; id.* App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States Army—1951* ¶ 127*c* (Supp. 1956); *id.* ¶¶ 197*g*, 198*a* and *b; id.* ¶ 213*b* (negligent homicide violation of Article 134, UCMJ); *id.* App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States Army—1951* ¶ 127*c* (Supp. 1955); *id.* ¶ 213*b; id.* App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States Army—1951* ¶ 127*c* (Supp. 1954); *id.* ¶ 213*b*; *id.* App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States—1951* ¶ 127*c*; *id.* ¶¶ 197*g*, 198*a* and *b* (negligent homicide is a lesser included offense to murder, voluntary manslaughter, and involuntary manslaughter); *id.* App. 6*c*, ¶ 144; *id.* App. 12, Arts. 118, 119; *Manual for Courts-Martial, United States Air Force—1949* ¶ 117*c*; *id.* ¶ 180*a* (negligent homicide is a lesser included offense to manslaughter); *id.* App. 4, ¶ 163; *Manual for Courts-Martial, United States Army—1949* ¶ 117*c; id.* ¶ 180*a* (negligent homicide is a lesser included offense to manslaughter); *id.* App. 4, ¶ 163.

the House of Representatives Armed Services Committee, and reports of both the Senate and the House, demonstrate that the intent of Congress was to retain under the proposed Article 134 all of the substantive offenses previously punished under Article of War 96.[8] Congress thus preserved in the UCMJ the plan for homicide prosecutions found in the Articles of War. See Articles 118, 119, and 134, UCMJ, 10 U.S.C. 918, 919, and 934. Murder and manslaughter were prosecuted under specific punitive articles in the Articles of War (see Articles of War 92 and 93, 41 Stat. 805), and negligent homicide was prosecuted under the general article (see Article of War 96). Most significantly, examination of

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[8]During subcommittee hearings on the proposed legislation, the following exchange occurred:

> Mr. Brooks: I would like to ask you this: suppose an offense is not defined under these punitive articles, is there any redress by court martial?
>
> Mr. Larkin: We have retained a general article, Article No. 134, which is similar to Article of War No. 96, and the Article for the Government of the Navy No. 22, so that offenses of—
>
> > disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces—
>
> is retained as it was provided in the Articles of War and in the Articles for the Government of the Navy. We have in a few instances made specific offenses out of conduct which heretofore was treated only by this general order, [*sic*] but otherwise it is the same.

Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1238-1239 (1949) [hereinafter cited as *House Hearings*] (Pet. App. 6a-7a). See H.R. Rep. 491, 81st Cong., 1st Sess. 35 (1949) (Provisions of Article of War 96 and Article for Government of the Navy 22(a) retained in Article 134, UCMJ); S. Rep. 486, 81st Cong., 1st Sess. 32 (1949).

the full legislative history of the proposed UCMJ gives no indication that Congress specifically intended to preempt the offense of negligent homicide or to "cover the entire field" of homicide under Articles 118 and 119.[9] This silence is in marked contrast to the House subcommittee's discussion of rape under proposed Article 120, UCMJ, 10 U.S.C. 920, in which the subcommittee expressed concern with the generality of Article 134 and decided instead to draft a specific article defining the elements of the crime of rape. See note 8, *supra*; *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1254-1258 (1949). The subcommittee's discussion of proposed Article 120 is thus compelling evidence that the proposed murder and manslaughter Articles were not intended to preempt prosecution of negligent homicide under Article 134.

In summary, the Court of Military Appeals' settled construction of Article 134 correctly interprets Congress's intent that negligent homicide continue to be prosecuted under that Article — especially in light of Congress's inaction in the face of such prosecutions since 1944.[10]

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[9]See H.R. Rep. 491, *supra*, at 35, 104; *Uniform Code of Military Justice (No. 44): Hearings on H.R. 3341 and H.R. 4080 Before the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1325-1354 (1949); *House Hearings* 687, 772, 814, 823, 1231-1253 (see note 8, *supra*); S. Rep. 486, *supra*, at 32; *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 26, 37, 200, 209, 261, 275-276 (1949); H.R. Conf. Rep. 1946, 81st Cong., 2d Sess. 1-5 (1950).

[10]Since the UCMJ was first enacted, Congress has passed 22 bills changing various sections of the Code. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*; Act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(12) and (13), 96 Stat. 1289; Military Justice Amendments of 1981, Pub. L. No. 97-81, §§ 1-6, 95 Stat. 1085-1089; Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3369; Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 511(24) and (25), 94 Stat. 2922; Department of Defense

2. The Court of Military Appeals' construction of Article 134 is entitled to considerable deference from this Court.

Authorization Act, 1980, Pub. L. No. 96-107, § 801(a) and (b), 93 Stat. 810 and 811; Act of Oct. 18, 1976, Pub. L. No. 94-550, § 3, 90 Stat. 2535; Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1335; Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178 *et seq.*; Act of Dec. 8, 1967, Pub. L. No. 90-179, § 1, 81 Stat. 545; Act of Nov. 2, 1966, Pub. L. No. 89-718, § 8(a), 80 Stat. 1117; Department of Transportation Act, Pub. L. No. 89-670, § 10(g), 80 Stat. 948; Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, § 403(j), 78 Stat. 434; Act of Sept. 7, 1962, Pub. L. No. 87-651, § 104, 76 Stat. 508; Act of Sept. 7, 1962, Pub. L. No. 87-648, 76 Stat. 447 *et seq.*; Act of Oct. 4, 1961, Pub. L. No. 87-385, 75 Stat. 814 *et seq.*; Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468 *et seq.*; Hawaii Omnibus Act, Pub. L. No. 86-624, § 4(b), 74 Stat. 411; Act of July 5, 1960, Pub. L. No. 86-589, 74 Stat. 329; Alaska Omnibus Act, Pub. L. No. 86-70, § 6(b), 73 Stat. 142; Act of Sept. 2, 1958, Pub. L. No. 85-861, § 33(a) and (b), 72 Stat. 1564 and 1566; Act of Aug. 10, 1956, ch. 1041, 70A Stat. 1 *et seq.*

Congress also has considered and rejected a proposal by Senator Hatfield to eliminate Article 134 altogether and codify certain offenses now punishable under that Article. S. 2183, 92d Cong., 1st Sess. (1971).

Congress has exercised its oversight function to correct by legislation decisions of the Court of Military Appeals that it has deemed erroneous. The Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468 *et seq.*, was expressly intended to reverse the holding in *United States* v. *Simpson*, 10 C.M.A. 229, 27 C.M.R. 303 (1959), invalidating automatic reduction provisions of the *Manual for Courts-Martial, United States—1951*. See S. Rep. 1737, 86th Cong., 2d Sess. (1960). Similarly, an amendment to Title VIII of the Defense Department Authorization Act, 1980, Pub. L. No. 96-107, 93 Stat. 803 *et seq.*, was "expressly intended to overrule *United States* v. *Russo*, 1 M.J. 134 (CMA 1975)," thus eliminating in personam jurisdictional problems in enlistment cases. S. Rep. 96-197, 96th Cong., 1st Sess. 121-122 (1980). See also Military Justice Act of 1983, Pub. L. No. 98-209, § 7(b), 97 Stat. 1402, amending, inter alia, Article 66(a), UCMJ, 10 U.S.C. (Supp. I) 866(a), to permit en banc review of Court of Military Review panel decisions by the full court, thus overruling *United States* v. *Chilcote*, 20 C.M.A. 283, 43 C.M.R. 123 (1971).

In addition, Congress has maintained a Code Committee since 1950 to evaluate the military justice system and report to Congress annually. Act of May 5, 1950, ch. 169, art. 67(g), 64 Stat. 130; Article 67(g), UCMJ, 10 U.S.C. (Supp. I) 867(g). See S. Rep. 98-53, 98th Cong., 1st

In 1952, the Court of Military Appeals announced its decision in *United States* v. *Kirchner*, 1 C.M.A. 477, 4 C.M.R. 69, holding that negligent homicide predicated on simple negligence is an offense punishable under Article 134. That decision represented a virtually contemporaneous construction of the newly-enacted UCMJ, and it has remained unchanged by Congress for 33 years. See notes 5 and 10, *supra*. This holding by the Court of Military Appeals raises no constitutional issue, but instead involves construction of a criminal statute peculiar to the military. In dealing with such matters, this Court has noted that judgments of the Court of Military Appeals "are normally entitled to great deference." *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); see also *Burns* v. *Wilson*, 346 U.S. 137, 140-142 (1953). Such "great deference" is appropriate here.[11]

Sess. 29 (1983). In 1983, Congress established a nine-member commission to study six military justice issues and report to Congress. Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b), 97 Stat. 1404; H.R. Rep. 98-549, 98th Cong., 1st Sess. 17 (1983) (sixth issue directed to commission for study).

[11]For similar reasons, this Court has long recognized that the construction of a statute by the agency charged with its administration is entitled to substantial deference, particularly when Congress has declined to alter such a construction. See, *e.g.*, *Bob Jones University* v. *United States*, 461 U.S. 574, 599 (1983); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978). Such deference is especially due when the agency interpretation involves a contemporaneous construction of new legislation. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Given the Court of Military Appeals' special role as interpreter of the UCMJ (Article 67, UCMJ, 10 U.S.C. (& Supp. I) 867), and its obligation to recommend amendments to the UCMJ (Article 67(g)(1), 10 U.S.C. (Supp. I) 867(g)(l)), the standard of deference to be accorded that court's decisions as to issues of pure statutory construction, as here, should be at least as great as the standard of deference accorded other federal agencies. Under the agency deference standard, the Court of Military Appeals' construction of Article 134 clearly should be upheld.

Finally, this Court's practice is to accept a reasonable construction of state law by a court of appeals " 'even if an examination of the state-law

3. The Court of Military Appeals' construction of Article 134 is reasonable in view of the specialized needs of the Armed Forces. In *United States* v. *Kick, supra*, the Court of Military Appeals articulated some of the unique policy considerations that support military prosecutions for negligent homicide on the basis of a simple negligence standard (7 M.J. at 84 (citation omitted)):

> "There is a special need in the military to make the killing of another as a result of simple negligence a criminal act. This is because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection."

This Court has long recognized that the unique disciplinary structure of the military and the special nature of military life will frequently require application of a different legal rule from that which obtains in the civilian community. See, *e.g., Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Parker* v. *Levy*, 417 U.S. 733, 743-744 (1974). By its very nature, the military establishment necessarily places young and inexperienced persons in positions of great responsibility—positions in which merely careless performance easily can cause serious injury or death. The military's need to deter

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issue without such guidance might have justified a different conclusion.' " *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983) (quoting *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976)). To the extent that the Court of Military Appeals stands in the position of a federal circuit court interpreting a body of local law distinct from the law that governs in the federal judicial establishment, see *Burns* v. *Wilson*, 346 U.S. at 140, this line of cases provides an additional reason to accord deference to the Court of Military Appeals' construction of Article 134.

simple negligence by its service members is real and compelling.[12]

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[12]The scope of the need is illustrated by the fact that the Army has obtained 542 convictions for negligent homicide in violation of Article 134 since 1955. Source: Office of the Clerk of Court, United States Army Court of Military Review. Negligent homicide offenses outside the sphere of training also affect the Armed Forces, as the Army Court of Review recently found in *United States* v. *Reitz*, 12 M.J. 784, 786-787 (A.C.M.R. 1982) (offense committed in the Federal Republic of Germany). In *Reitz*, the Army Court of Military Review found that a soldier's negligent driving of a privately owned automobile off the military reservation, during his off duty time, causing the death of another soldier, was prejudicial to good order and discipline in the Armed Forces and reflected discredit upon the Armed Forces, in violation of Article 134. Cf. *United States* v. *King*, 4 M.J. 785, 786-787 (N.C.M.R. 1977), aff'd, 7 M.J. 207 (C.M.A. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1985

DOJ-1985-08

APPENDIX

UNITED STATES ARMY COURT
OF MILITARY REVIEW

Before
MOUNTS, YAWN and WERNER
Appellate Military Judges

UNITED STATES, Appellee	)	
	)	
v.	)	CM 443478
	)	
Private First Class	)	
JOHN SPICER, JR.,	)	
SSN 158-56-2966,	)	
United States Army, Appellant	)	

ORDER

WHEREAS, appellate defense counsel have filed an "Assignment of Error and Brief on Behalf of Appellant," and appellate government counsel have responded thereto;

WHEREAS, this case was orally argued on 17 October 1983; and

WHEREAS, this Court desires additional briefs, it is by this Court this date

ORDERED:

That the issue specified below be briefed by counsel for appellant and government. The brief on behalf of appellant will be filed within thirty days after the filing of this order and government's reply will be filed within thirty days after the filing of appellant's brief.

SHOULD THE NEGLIGENT OPERATION OF A PRIVATELY OWNED MOTOR VEHICLE WHICH IS THE PROXIMATE CAUSE OF A PERSON'S DEATH CONTINUE TO CONSTITUTE THE OFFENSE OF NEGLIGENT HOMICIDE, IN VIOLATION OF ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 934 (1976), IN VIEW OF THE APPARENT DELETION OF THESE ACTS AS A CRIME IN SOME JURISDICTIONS?

Dated: 18 October 1983

FOR THE COURT:

RICHARD A. MILLER
Captain, JAGC
Chief Deputy Clerk of Court